ELECTION COMMISSION, INDIA.

NEW DELHI,
Dated the 10th November, 1967.

NOTIFICATION

No. 82/MY/13/67.—In pursuance of section 106 of the Representation of the People Act, 1951, the Election Commission hereby publishes the Order, pronounced on the 4th October, 1967 by the High Court of Mysore at Bangalore in Election Petition No. 13 of 1967.

IN THE HIGH COURT OF MYSORE AT BANGALORE.

Dated the 4th day of October 1967.

Before

THE HON'BLE MR. JUSTICE K. R. GOPIVALLABHA IYENGAR

Election Petition No. 13 of 1967

1. H. Sridhara Pai, son of Keshava Pai, aged about 43 years, Businessman, residing near Taluk Office, Udipi Town.
2. H. Ramanatha Pai, son of Vasudeva Pai, aged about 52 years, Advocate, Udipi Town .... *Petitioners.*

—Versus—

1. Amin, S. K., son of Koosu Kundar, aged about 45 years, Businessman, residing at Goods Shed Road, Bundar, Mangalore-1.
   K. Muddu Suvarna, Nephew of Thoma Suvarna, aged about 48 years, P. W. D. Contractor and Land-holder, residing at Katapady of Yanagudde Village, Udipi Taluk, Post Katpady, South Kanara .... *Respondents.*

Election Petition filed by the Petitioners under Section 81 of the Representation of the People Act, 1951 challenging the election of the Respondent No. 1 to the Mysore Legislative Assembly from No. 139, Udipi Constituency at the 1967 General Election and seeking an order that the election of first respondent, the returned candidate to the Mysore Legislative Assembly from No. 139, Udipi Constituency at the 1967 General Elections is declared by this Court as null and void and that the petitioners may be granted their costs of these proceedings.

This Election Petition coming on for trial on Tuesday 5th, Wednesday 6th, Friday 8th, Monday 11th, Tuesday 12th, Wednesday 13th, Thursday 14th, Friday 15th, Monday 18th, Tuesday 19th, Wednesday 20, Thursday 21st, Friday 22nd, Monday 25th, Tuesday 26th, Wednesday 27th, Thursday 28th days of September, 1967, in the presence of Sri K. R. Karanth and Sri K. R. D. Karanth and Sri B. Y. Holla, Advocate for the Petitioners and Sri K. Shivashankar, Bhat and A. Anandashetty and Sri P. Vishwanatha Shetty (filed vakalat on 5th September 1967) Advocate for Respondent No. 1 and Sri B. P. Karunakaran, Respondent No. 2 absent and this Election Petition having stood over for consideration, the Court made the following Order this 4th day of October, 1967.

ORDER.

The petitioners in this case are voters included in the Electoral Roll of the Mysore Legislative Assembly, Udipi Constituency No 139 in the District of South Kanara. This petition is filed by them under Section 81 of the Representation of the People Act, 1951, hereinafter referred to as the "Act", challenging the validity of the Election of the 1st respondent, to fill the seat of the above Constituency. The 1st respondent was set up by the Congress Party as their Candidate for election from the above Constituency. The 2nd respondent was an independent candidate. One U. S. Nayak was set up by the Praja Socielist Party (hereinafter

called the P. S. P.) as their party candidate for election. It may be mentioned that there were two more independent candidates besides a candidate nominated by the Swatantra Party. There were, therefore, six candidates in the contest. The 1st respondent—the Congress Candidate secured 11,737 votes, the P S. P Candidate - U. S. Nayak—secured 10 611 votes; the third in order is the 2nd respondent who secured 8,418 votes. The Swatantra Candidate and two other independent candidates secured 2,350, 1,214 and 662 votes, respectively. The number of invalid votes was 2 369. It is stated that the total number of Electors in the Constituency is about 51,000 and 37,561 votes were polled at the Elections. The 1st respondent having secured the largest number of votes was declared elected.

The petitioners have challenged the validity of the election of the 1st respondent on various grounds. In the petition, it is alleged that the 2nd respondent is a contractor of the Department of Public Works of the State of Mysore and at the time of scrutiny of the nomination papers, the 2nd respondent held two subsisting contracts with the State Government for the execution of certain work. It is stated that the 2nd respondent held a contract dated 26th June 1964 for the formation of a Fisheries Road starting from mile 34/1 of the Mangalore—Byndur coastal road, to the Udyavar Fish Curing Yard near the Sea shore in the Udipi Taluk of South Kanara in the area of the Constituency; the total value of this work is about Rs. 1,07,000. By January 1967, only a portion of the work had been done. Major portion of the work remained yet to be completed and the contract dated 23th June 1964 was still subsisting. Further, it is submitted that the 2nd respondent had another contract dated 8th January 1964 for the formation of a by-pass road in the aforesaid Coast Road to by-pass the town of Katpady in Yemagudda village about 6 miles from Udipi, the total cost of the work being about Rupees 4,00,000. It is stated that this work is not completed and the contract is still subsisting. It is stated that for the abovesaid reasons, the 2nd respondent was disqualified from standing as a candidate for election, in view of

the provisions of section 9 (A) of the Act, and therefore, his nomination paper should not have been accepted by the Returning Officer.

The petitioners have then set out the circumstances to support the contention that the result of the Election has been materially affected by the improper acceptance of the nomination of the 2nd respondent by the Returning Officer. It is submitted that the 2nd respondent was, till December 1966, a member of the Congress Party for a number of years. Being dissatisfied with the choice of the 1st respondent and others as Congress Candidates by the Congress Party Parliamentary Board for the Udipi Constituency, and for some other constituencies, he came out of the Congress Party just prior to his filing his nomination as a candidate to contest the elections as an independent candidate. The 2nd respondent is a member of Billava Community, which, according to the petitioners, has about 8,000 to 9,000 electors in the constituency. It is said that they supported him and voted for him at the elections held on 15th February 1967. It is also alleged that on account of the hostile attitude and action taken by the 2nd respondent, he has since been expelled from the Congress Party for a period of six years. It is next averred that if the 2nd respondent was disqualified to stand for election and out of the contest, all the votes cast in favour of the second respondent would have been cast in favouf of U. S. Nayak, the P.S.P. candidate. The petitioners also urged that all the votes cast in favour of the 2nd respondent and other contesting candidates apart from the 1st respondent were, as a matter of fact, cast against the 1st respondent—the Congress Candidate. It is pointed out that the difference between the number of votes polled by the 1st respondent and that by the P.S.P. Candidates is only 1126 and therefore it is stated that if the 2nd respondent had not filed his nomination and contested the election, the bulk of the large number of votes obtained by him, namely, 8418 would certainly have been cast in favour of the P.S.P. Candidate. Therefore. the improper acceptance of the nomination of the 2nd

respondent by the Returning Officer has meterially affected the election. The petitioners also refer to the fact that the Udipi Parliamentary Constituency consisted of eight Assembly Constituencies and in all the Constituencies, excepting the Udipi Constituency, the Congress candidates were defeated. The Congress candidate set up in Udipi Parliamentary Constituency was also defeated.

The next ground urged by the petitioners is that the 1st respondent himself is disqualified from standing as a candidate for election under Section 10 of the Act. It is alleged that the1st respondent is the President of a Co-operative Society, called the South Kanara District Co-operative Fish Marketing Federation with its Head Office in Mangalore. It is also pointed out that out of its share capital of Rs. 2,58,100, the Government's contribution is Rs. 2,04,000. It is further alleged that the 1st respondent has been drawing a remuneration from the said Federation. It is fairly large and cannot be considered a compensatory allowance. The share capital supplied by the State is more than 25 per cent; it is contended that the 1st respondent comes within the meaning of the words "Managing Agent, Manager of a Company or Corporation" within the meaning of Section 10 of the Act. The petitioners further state that the exception made in this Section by the words "other than a Co-operative Society" in null and void as being discriminatory, and offends Article 14 of the Constitution. Therefore, the petitioners contend that even the nomination of the 1st respondent should have been rejected by the Returning Officer as the 1st respondent was disqualified from standing as a candidate by virtue of Section 10, mentioned above.

The first respondent filed his written statement on 5th July 1967. The second respondent filed his statement on 13th September 1967 after issues had been framed and recording of evidence had commenced. He also submitted to the Court that beyond filing the statement, he does not propose to take part in the further proceedings of the case.

The first respondent in his written statement denies that the second respondent was a Contractor of the Public Works Department of the State of Mysore and, at any rate, he had no subsisting contract of any sort with the Government of Mysore in the course of his trade or business between 19th January 1967 and 16th February 1967 referred to as the period of election. The first respondent also submits that there was no written agreement in force entered into by the second respondent with the State of Mysore during this period. It is submitted that there has been no improper acceptance of the nomination of the second respondent.

This respondent also does not admit that the electors belonging to the Billavar community number 8,000 to 9,000 in the Udupi Assembly Constituency, which will hereafter be referred to as the Constituency. He also disputes that, by and large, the electors of this community voted for the second respondent. Further the respondent submits that it cannot be predicted that the voters of this community would have voted for U. S Nayak or other candidates, if the second respondent did not contest the election; the plea of the petitioners in this connection is only a conjecture and it is suggested that, if the voters should be guided by communal considerations, it is probable that Billavar voters would have voted for Subbayya Rai and this respondent as they were non-Brahmin candidates. It is further alleged that the second respondent had been an active Congressman and the votes polled by him were Congress votes. By virtue of his candidature, the Congress votes were split, thereby reducing the majority of the votes polled by the respondent. Therefore, it is submitted that, if the second respondent had not stood for election, the first respondent would have polled a larger number of votes than what he has secured now. The first respondent also refers to the election to the Lok Sabha from the Udipi Assembly Constituency and states that out of 3 candidates who stood for election, the Swatantra Candidate polled the largest number of votes; the Congress came next and the P. S. P. the third. This is pointed out

as an indication that the votes obtained by the second respondent would not have been cast in favour of the P. S. P. Candidate.

The first respondent admits that he is a Director and the President of a Co- perative Society called South Kanara District Co-Op rative Fish Marketing Federation Limited, Mangalore. A copy of the Bye-laws of the Federation has been produced and is marked as Exhibit P-11 by the petitioners and the copy of the Bye-laws produced by the respondent is marked as R. 21. It is submitted that a provision is made only for the payment of honorarium to the President and the Vice President subject to certain conditions. It is the General Body that sanctions the honorarium and the Government has nothing to do with it. Honorarium paid to the President is an ex gratia payment. It is further submitted that the Federation being a Co-Operative Society, this respondent is exempt from the disqualification provided under Section 10 of the Act. It is also contended that the respondent is not a Managing Agent, Manager or a Secretary of the Society and the qualification cannot attach to him. It is further contended that the provisions of Section 10 are not violative of any provision of the Constitution and if the contention of the petitioners can be countenanced the entire Section 10 would be void and in the result there is no scope for the plea that the first respondent is disqualified. It is further submitted that the qualifications to stand as a candidate for election being prescribed under a special enactment, the Representation of People Act, the election cannot be challenged on the ground that one of the provisions of the Act is opposed to the provisions of the Constitution, and the validity or otherwise of the provision cannot be decided in an Election Petition. On these pleadings, the following issues were framed:—

ISSUES

1. Do the petitioners prove that the second respondent was a Contractor of the Public Works Department of the

State of Mysore and contracts undertaken by him were subsisting at the time of the election and therefore the second respondent was disqualified from standing as a candidate for the election under section 9-A of the Representation of the People Act, 1951 and therefore his nomination paper should not have been accepted?

2. Do the petitioners prove that the acceptance of the second respondent's nomination was improper and that the result of the election in so far as it concerned the first respondent (returned candidate) has been materially affected?

3. Do the petitioners prove that by virtue of the fact that the first respondent is the President of the South Kanara District Co-operative Fish Marketing Federation, Mangalore, he comes within the disqualification prescribed under section 10 of the Representation of the People Act?

4. Is the petitioners, contention that the exception provided in section 10 in respect of a Co-operative Society is violative of the provisions of Article 14 of the Constitution maintainable? If so, is the impugned section in part or as a whole opposed to Article 14?

5. To what reliefs are the petitioners entitled?

The second respondent on leave being granted to file his written statement, has filed it. He submits that at the time of the nomination and at the time of the election, a few works which he had contracted earlier had not been completed as the Public Works Department had not put him in a position to complete the works within the specified time. He pleads that certain work sites had not been put in his possession. The second respondent submits that he honestly believed that he was not disqualified to stand for election and that the candidates who opposed him knew about it and did not raise any objection at the time of the scrutiny of the nomination papers. He pleads that in the event of the petition being allowed, he is not liable for costs, and further that in any event the petitioners are not entitled to costs even if they succeed. The 2nd respondent submitted

that he does not press for any additional issue being framed and that he does not propose to examine or cross-examine any witness or to further participate in the proceedings.

The petitioners are represented by Sriyuths K.R. Karanth and K.R.D. Karanth, Advocates, while the first respondent, hereinafter referred to as the respondent is represented by Sriyuths K. Shivashankar Bhat, A. Ananda Shetty and P. Viswanatha Setty. The petitioners have examined 21 witnesses and marked Exhibits P-1 to P-12. The respondent has exmined 11 witnesses and has marked documents, R-1 to R-21. Exhibits P-1, P-2, P-3, P-9, P-10, R-1, to R-16, R-17, R-18, R-19, R-20, R-21 were marked as exhibits by consent of parties. Translations of P. 3, P .9 and P-10 are marked exhibits P-3(a), P9-a) and P-10(a).

At the outset, the respondent's counsel raises an objection that the petitioners's case being one of improper acceptance of the 2nd respondent's nomination paper by the Returning Officer comes within the purview of Section 100 (1) (d) (i) of the Representation of the People Act, 1951. He contends that the petitioner could be permitted to raise this ground in this petition only if he has raised the objection againt the acceptance of the nomination paper before the Returning Officer. In this case, it is undisputed that no objection was raised before the Returning Officer for the acceptance of the nomination paper of the 2nd respondent. It may however be observed here that the petitioners before me are only voters who are entitled to file this election petition under the provisions of section 81 of the Representation of the People Act. They had no opportunity of raising the objection aginst the acceptance of the nomination paper of the 2nd respondent by the Returning Officer. However, my attention is invited by the Respondent's counsel to the decisions reported in A.I.R.1954 Supreme Court 520 (DURGA SHANKAR *V.* RAGHURAJ SINGH), A.I.R. 1959 Supreme Court 422 (VELUSWAMI *V.* RAJANAINAR , and A.I.R. 1960 Supreme Court, 363 (S.M. BANESJI *V.* SRI KRISHNA), in support of the contention. The petitioners' counsel also relies on the

decision reported in A.I.R. 1960 Supreme Court 368 S.M. BANERJI V. SRIKRISHNA) in support of his contention that even if it is assumed that his objection comes within the purview of sub-clause (i) of clause (d) and it is necessary to have raised the objection in in regard to the acceptance of the nomination paper of the candidate before the Returning Officer, the fulfilment of such condition is not necessary when the pleadings permit the question being covered by section 100 (1) d (iv) of the Act. In A. I. R. 1951 Supreme Court, 520 (DURGA SHANKAR V. RAGHURAJ SINGH), it is observed that:

> "If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, on enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. This would be apparent from section 36 sub-section (7) of the Act,"

They further say:

> "It would have been an improper acceptance, if the want of qualification was apparent on the electorol roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the materials placed before him. When neither of

these things happened the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance."

These observation support the contention of the respondent that the acceptance of the nomination paper by the Returning Officer must be deemed tobe proper acceptance. The decision in A. I. R. 1959 Supreme Court at page 422 (VELU SWAMY V. RAJA NAINAR) also deals with improper acceptance coming within section 100, clause (1) (d) (1) of the Act, but it must be noted that the question that came up for decision related to the improper rejection of a nomination paper. The other decision which is useful to come to a decision in respect of the above question is the one reported in A. I. R. 1960 Supreme Court at page 368 (S. M. BANERJI V. SRI KRISHNA). In this case, the appellent had secured the largest number of votes and was declared elected. The respondent who was one of the voters in the Constituency presented a petition before the Election Commission, New Delhi, praying that the election of the appellant be declared void. During the course of the proceeding before the Tribunal, the petitioner sought an amendment of the petition to raise an additional ground that a certificate as required under section 9(3) and section 33(3) of the Act did not accompany the nomination paper of the respondent and the acceptance of his nomination paper was improper and it materially affected the result of the election. The Tribunal disallowed the applications for amendment on the ground that they sought to introduce a new ground after the prescribed period of limitation. Eventually, the election petition also came to be dismissed. On appeal to the High Court, the order of the Tribunal was set aside and the High Court found on a construction of the pleadings that the allegations found in the original petition were sufficient to bring the case under section 100 (1) (d) (i) of the Act, that is, under the head 'improper acceptance' and that the amendment asked for was only a clarification but not an introduction of a new ground. The High Court set aside the order of the Tribunal and issued direction to the Tribunal to decide the issues that

arose out of the amendment. On appeal against the judgment, the Supreme Court, after setting out the provisions of sections 9(3), 33(3) and section 36 of the Representation of the People Act, observed as follows:

> "The foregoing provisions, so far relevent to the present enquiry, may be summarised thus: If a candidate has been dismissed from Government service and a period of five years has not elapsed since dismissal he will have to file along with the nomination paper a certificate issued in the prescribed manner by Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State. It has not been done, the Returning Officer, either *suo motu* or on objections raised by the opposite party, has to reject the nomination. If the nomination paper does not disclose any such defect and if the Returning Officer has no knowledge of that fact he has no option but to accept the nomination. The returning Officer may improperly accept a nomination paper though it discloses the said defect and though an objection is raised to its reception on that ground. Section 100(1))(d)(i) of the Act deals with improper acceptance of any nomination and S.100 (1) (d) (iv) permits an attack on the ground, among others, of non-compliance with the provisions of the Act.

The Court further considered the import of the decisions in A I R. 1954 Supreme Court 520 (DURGA-SHANKAR V. RAGHURAJ SINGH) and A.I.R. 1959 Supreme Court, 422 (VELUSWAMI V. RAJA NAINAR), referred to by me earlier and ultimately observed in paragraph-13 as follows: —

> "The foregoing discussion yields the following results: (1) Sub-cls (i) and (iv) of S.100(1)(d) of the Act provide for two distinct grounds; the former for the case of improper acceptance of any nomination, and the latter for that of

non-compliance with the provisions of the Constitution or of the Act, or of any rules or orders made under the Act; (2) when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination the acceptance of the said nomination by the Returning Officer must be deemed to be proper acceptance; (3) even if there is a proper acceptance, it is opento the petitoner to question the validity of the election under S.100(1)(d)(iv) on other grounds, namely, that the candidae whose nomination was accepted not qualified at all or could not be deemed to be duly nominated as a candidate for the reason that he did not comply with the provisions of S.33(3) of the Act; and (4) if the second ground in substance is not taken in the petition-substance is more important than form—the Tribunal has no power after the prescribed period of limitation for the filing of the petition to allow an amendment introducing the second ground."

Shri Karanth invites the Court to scrutinise the pleading in this case, keeping the above observations of the Supreme Court as the background. His submission is that even if there is a proper acceptance, it is open to him to question the validity of the election under section 100(1)(d)(iv) on other grounds, namely, that the candidate whose nomination was accepted was not qualified at all. In paragraphs 7 and 9 of the petition, the petitioners have stated that the 2nd respondent was disqualified from standing as a candidate for the election by virtue of Section 9 A of the Act and they have also set out other circumstances which indicate how the result of the election has been materially affected on account of the improper acceptance. It appears to me that the contention of Shri Karanth should be accepted and the plea in this case should be treated as one coming under the provisions of clause (iv) of sub-clause (d) of section 100(1) of the Act.

Therefore, I now proceed to deal with the reason on merits. The basic question that underlies the first issue is whether the second respondent was a contractor of the Public Works Department of the State of Mysore and contracts undertaken by him were subsisting at the time of the election. Before proceeding to consider the petitioners' submissions in this regard, the statement filed by the second respondent may be referred to. The second respondent states that at the time of the election, few works for which he had contracted earlier had not been completed, as the Public Works Department had not put the respondent in a position to complete the work within the prescribed time. He states that he honestly believed that he was not disqualified to stand for the election. The second respondent has not been examined in this case. From the facts disclosed in the course of the evidence, it is established that the respondent is an active and prominent Congressman and a leader of the Billavar community. It is not easy to accept his statement that he honestly believed that he was not disqualified to stand for the election. He was quite aware that the works in respect of which he contracted earlier in the Public Works Department had not been completed. What is curious is that neither the 1st respondent nor the P. S. P. candidate of any other raised the objection that the 2nd respondent's nomination should not be accepted.

Exhibit P. 4 is the contract dated 26th June 1964 under which the second respondent entered into an agreement for forming a fisheries road starting from mile 34/1 of M. B. C. Road to Udyavar Fish Curing yard in Udipi Taluk of South Kanara District. The time within which the work was to be completed was 18 months from the date of handing over of the sites. The respondent's counsel submitted that the time for the completion of the work would end by the end of December, 1966 and according to him, on the relevant date, the contract under Exhibit P-4 had ceased to subsist on account of efflux of time fixed thereunder. The petitioners point out that exhibit P.5,

which is a check measurement book connected with the work coming under Exhibit P.4 indicates that measurements have been taken on 12th June 1967 and the payment has been made after such measurement was taken. In this connection, the petitioners have examined P. W. 1. P. W. 1. is an Assistant Engineer working under the Executive Engineer, Public Works Department, Udipi Division, Udipi on 10th January 1966. He speaks to Ex. P.4 which is an agreement between the second respondent and the State of Mysore. P. W. 1 states that the work referred to in Ex. P. 4 is not completed and it is yet going on. He has checked the works executed by the second respondent from 27th January 1966. This is evidenced by Ex. P. 5 (f) and Ex. P. 5 (a) is the signature of the second respondent for having accepted the measurements. Ex. P. 5 (b) denotes the check made by P. W. 1 on 19th February 1966. Payment has been made on 24th February 1966 as per entry Ex. P. 5 (c). As per Ex. P. 5 (d), P. W. 1 has check-measured on 12th June 1967 the works executed subsequent to 8th May 1967. Payment in respect of this has been made as evidenced by Ex. P. 5 (e) on 12th June 1967. P. W. 1 further states that in between 27th January 1967 and 12th June 1967, several measurements have been taken and corresponding payments have been made to respondent No. 2. P. W. 1 definitely states that 70 per cent of the work covered by the agreement, Ex. P. 4 has been completed by now. He also speaks to the execution of the contract, Ex. P. 6 between 2nd respondent and the Executive Engineer, Special West Coast Division, Mangalore, dated 26th October 1964. From the letter of the Executive Engineer, Ex. P. 7 dated 31st August 1967, it is also clear that the contractor has not yet completed the work. On the basis of these documents, it is contended by Sri K. R. Karanth, the learned counsel for the petitioners that there is unimpeachable evidence that the contract under Ex. P. 4 and P. 6 were subsisting on the date of election. The contention of Sri. K. Shivashankar Bhat is that under the terms of the contract, time has to be considered as the essence of the agreement and the time fixed for the contract expired by December 1966 as already mentioned and the

contract could not have been deemed to have subsisted on the date of election. My attention is also drawn to the recital of the agreement that the period fixed under clause 4 of the agreement is subject to the provision for the extension of time under Article 109-04 of the Standard Preliminary Specification. The aforesaid Article provides for extension of contract time stipulated for completion. It provides that under certain cirumstances, the contractor should apply for extension of time and give notice of the reason in writing to the Engineer and the Engineer is vested with the power to grant extension of time for the completion of work. The last sentence in the Article referred to above reads as follows:—

> "Any extension or further extension of time under the provisions herein contained may be allowed notwithstanding that the Contractor has failed to give notice of the cause therefor or that the date for completion may have passed or that the work may have been completed."

It is clear from the above said provisions underlined that the Executive Engineer has power to grant extension of time. Ex. A. 5 is clear proof of the fact that the Executive Engineer has extended the time for completion of the works and therefore the contract for the execution of works as stipulated under Ex. P. 4 and P. 6 were subsisting on the date of election. The evidence of P. W. 1 and the documents referred to above are unimpeachable and support the above conclusion. In any event, if the contention of respondent has to be accepted, it merely means that the second respondent has failed to complete the work within the stipulated time and therefore has committed a breach of contract. The rights and liabilities between the contracting parties then require to be determined in terms of the contract. Therefore, the contract subsists for the ancillary purpose, *viz.*, to determine the rights and obligations of the parties. The decisions reported in A. I. R. 1954 Supreme Court, 236

(CHATTURBHUJ VITHALDAS JASANI *V.* MORESHWAR PARASHRAM AND OTHERS) , A. I. R. 1959 Madhya Pradesh, 39 (GAURI SHANKER *V.* MAYADHARDAS), A. I. R. 1960 Calcutta, 92 (BROJO GOPAL DAS AND OTHERS *V.* KALI PADA BANERJEE AND OTHERS), and the decision of this Court in Election Petition No. 21 of 1967 (Reported in II L. R. 825, H. R. ANNAMALI MUDALIAR *V.* DEVARAJA URS), support the above conclusion.

For the above reasons, my finding is that the contracts between the second respondent as a contractor and the Public Works Department of the State of Mysore were subsisting at the time of election and he was therefore disqualified from standing for election under Section 9-A of the Representation of People Act of 1951 and therefore the acceptance of the nomination paper was improper.

The next question that follows is, whether such an improper acceptance has materially affected the result of the election in so far as it concerns the first respondent who is the returned candidate. It is undisputed that the first respondent secured 11,737 votes. The next candidate is the P. S. P. candidate who secured 10,611 votes. The difference between the two is 1,126 votes. The second respondent whose nomination paper ought not to have been accepted, polled 8,418 votes. Therefore, the petitioners have to prove that the respondent would not have been able to secure more than half of the wasted votes, which, in this case, would be 8,418-1,126, *i. e.*, 3,646 votes. If the petitioners prove that the respondent could not have secured 3,647 votes, then it is possible to hold that the result of the election is materially affected. The other way of approaching the problem would be that the petitioners must prove that the next candidate, *i. e.*, the P S. P. candidate, in this case, would have polled 4,773 votes more than what he was done now.

The pertinent provision of the Act of 1951 under which the result of the election can be declared void is section 100

(1) (*d*), clauses (*i*) and (*iv*). Section 100 (1) (*d*), clause (*i*) and (iv) read as follows.—

> "(*d*) that the result of the election in so far as it concerns a returned candidate, has been materially affected.
>
> (*i*) by the improper acceptance of any nomination, or
>
> (*ii*) * * * * *
>
> (*iii*) * * * * *
>
> (*iv*) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the Tribunal shall declare the election of the returned candidate to be void."

The learned counsels for the contesting parties invite my attention to several decisions which indicate as to what factors govern cases where the infirmity is the improper acceptance of a nomination paper. My attention is drawn to the case reported in A. I. R. 1954 Supreme Court, 513 (VASHIST NARAIN SHARMA *v.* DEV CHANDRA) and to the following observations therein :

> "But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate."

The respondent's counsel next invites my attention to the decision reported in A I R. 1959 Madhya Pradesh P. 58 (INAYATULLAH *v.* DIWANCHAND). At page

64, their Lordships while referring to the decision of the Supreme Court, referred to above, observed as hereunder:

> "From these observations, it is therefore clear that general evidence of a likelihood, such as has been tendered in this case, is not decisive of the matter under S.100 of the Representation of of the People Act. What the party who wishes to get an election declared void has to establish is that the result of the poll had in fact been materially affected by the improper acceptance of a nomination paper. To do this, it has to be demonstrated that the votes would have been divided in such a way that the returned candidate would have been unsuccessful."

They further said:

> "We consider that the matter is not '*res-integra*' and our view of the matter is irrelevant. Their Lordships also noted with regret the difficulty of establishing such a result by concrete evidence and stated that the matter could only be rectified by the Legislature and not by the Courts. According to their Lordships the onus which was placed upon the contesting party was insuperable and incapable of being discharged. Indeed, the Legislature in laying that burden seems to ask the contestant to do the impossible. We do not consider that the matter is open to us to express a different view and applying the ruling to the facts of the case, which are analogous to those in the case which their Lordships decided, we must hold that the evidence tendered is not sufficient to discharge the onus which was upon Mahajan."

They further proceeded to observe;—

> "We cannot help expressing with regret that the law is as it is. It is quite obvious that the law

should not contemplate the doing of an impossible task by a candidate who is contesting the election of a candidate on such grounds. The law should provide for a burden of proof which would be capable of being humanly discharged and not a burden which no person can ever hope to discharge. We hope that the Legislature will intervene and deal with this question as their Lordships of the Supreme Court have already expressed."

On the basis of these observation, Sri K. Shivashankar Bhat contends that the petitioners cannot discharge the burden of proof laid on them, as it is impossible. The petitioners' counsel states that the view of the Madhya Pradesh High Court that the onus placed on the contending party is insuperable and incapable of being discharged is not correct and that the decision reported in A.I.R. 1954 Supreme Court P. 513, (VASHIST NARAIN SHARMA *v.* DEV CHANDRA AND OTHERS), does not lay down any such proposition. He invites my attention to the three later decisions of the Supreme Court, *viz*, 1957 Supreme Court, 442 (SURENDRA *v.* DALIP SINGH), 13 E.L.R. 1 (YAMUNA PRASAD *v.* JAGADISH PRASAD KHARE) and A.I.R. 1966 Supreme Court 824 (MAHADEO *v.* UDAI PRATAP). Relying on these decisions, he contends that it is open to the petitioners to show that in certain circumstances, it is quite possible for a party as the petitioners in this case to establish that the result of the election in so far as it concerns the returned candidate has been materially affected. A.I.R. 1957 Supreme Court, 242 (SURENDRA NATH KHOSLA AND ANOTHER *v.* S. DALIP SINGH AND OTHERS), is a case where a nomination paper was improperly rejected. It is held that in the case of improper rejection of nomination paper, the rejection materially affects the result of the election. They further observe that :

"Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors

> would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration. On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field."

On the basis of these observations, it is submitted that it is quite open to the petitioners to adduce evidence to establish that the result of the election has been materially affected. The case in 13 E.L.R. page 1, is an instance of a case where it may be possible for a petitioner challenging the result of the election on the basis that the nomination paper has been improperly accepted, to show that the result of the election has been materially affected. The facts of the case are that the petitioner was a candidate on behalf of the Praja Socialist Party. The first respondent was a candidate of the Congress Party. One Baijnath Dube was also a candidate of the Praja Socialist Party. The Congress candidate secured 1398 votes while Baijanath Dube and the petitioner secured 1337 and 997 votes respectively. The petitioner contended that the nomination paper of Baijanath Dube ought not to have been accepted by the Returning Officer. it was held by the Tribunal that the nomination papers of Baijanath Dube was improperly accepted. Therefore, the question arose whether the election so far as the returned candidate was concerned was materially affected. The Tribunal expressed the view that the case before them was a unique case of its kind as there were 2 candidates of the same party. They held that if the petitionerhad been the only candidate on behalf of the P. S. Party, he would have got almost all the votes of the Baijanath Dube. Therefore, they held that it has been proved by positive evidence that as a result of the impro-

per acceptance of Baijanath Dubey's nomination paper, the result of the election was materially affected. In the result the Tribunal allowed the petition and declared the election of the declared candidate wholly void. On appeal, the Supreme Court observed that the question that arises is whether having regard to Vashist Narain's case, this was a permissible mode of deciding the matter and whether such evidence was relevant and admissible. They observe this is a question which we do not think, it is expedient for us to decide in the circumstances of the case, as they exist at present. The Vindhya Pradesh Assembly to which the successful candidate was elected is now no longer in existence and the new elections are coming in very shortly." Having made these observations, they did not proceed to consider the above legal question. It is submitted by the petitioners' counsel that the above case is a typical instance of a case where it is quite possible to discharge in certain circumstances the burden of proof laid on the petitioner under section 100 (d) of the Act. The next decision on which the petitioner relies is the one reported in A. I. R. 1966 Supreme Court, 824 (MAHADEO v. UDAI PRATAP). The question that arose for decision before the Supreme Court was whether the appellant's election had become void under Section 100 (1) (d) (iv) of the Act. After dealing with the legislative history of the statutory provisions contained in Section 100 (1) (d) (iv), it is observed as follows :-

> "On the other hand, in regard to the category of cases where the infirmity was improper acceptance of a nomination paper, different considerations had to be taken into account. In Vashist Narain Sharma v. Dev Chand, 10 Ele. LR 30 : (AIR 1954 SC 513), it was held by this Court that "in the case of improper acceptance of a nomination : (a) if the nomination accepted was that of the returned candidate, the result must be materially affected: (b) if the difference between the number of votes is more than the wasted votes, the result cannot be affected at all; (c) if the number of wasted votes is greater

thanthe margin of votes between the returned candidate and the candidate securing the next highest number of votes, it cannot be presumed that the wasted votes might have gone to the latter and that the result of the election has been materially affected. This is a matter which has to be proved and, though it must be recognised that the petitioner in such a case is confronted with difficult situation he cannot be relieved of the duty imposed upon him by S. 100 (1) (c), and if the petitioner fails to adduce satisfactory evidence in support of his plea, the tribunal wood not interfere in his favour and would allow the election to stand."

The amending Act of 1956 has thus separated the cases of improper rejection of nomination papers from those where nomination papers have been improperly accepted. It will be recalled that both these cases had been grouped together under S. 100 (1) (c) of the unamended Act. Now the cases of improper rejection have been taken under S. 100 (1) (c), whereas cases of improper acceptance fall to be dealt with under S. 100 (1) (d) (iv). Where it is alleged that a nomination paper has been improperly accepted, it obviously means that the acceptance is the result of non-compliance with the provisions of the Constitution of the Act.—"

The Supreme Court examined the character of the infirmity on which the election of the appellant had been declared void by the High Court as well as the Election Tribunal. From this, it is clear that the Supreme Court has not taken the view that the onus laid on the contending party was insuperable and incapable of being discharged. Therefore, it is necessary to examine in this case, if the petitioners have successfully established that the result of the election in so far as it concerns the first respondent has been materially affected.

The petitioners' counsel refers to three documents, exhibits P. 3, P. 9 and P. 10 which, according to him, indicate the atmosphere that prevailed at the time of the election meaning thereby that the electorate was anti-Congress, as there was a split in the Congress Party, resulting in many leaders of the Congress Party going out of the party. It is pointed out that the last date for filling the nomination papers was 19th January 1967, the date for scrutiny was 21st January 1967 and the actual date of polling was 15th February 1967. Exhibits P. 3, P. 9 and P. 10 have been admitted in evidence by consent. The earliest of these documents is exhibit P. 9 dated 1st January 1967. It is an editorial in the Kannada Weekly (Prakash) published in Udipi and is dated 1st January 1967. The editor of Prakash is one A. G. Alse, who was a Congress man who left the party along with respondent No. 2. Exhibit P 9 to a large extent, contains the opinion of the editor or statements or hearsay. But a reading of exhibit P. 9, a part of which is factual, gives an impression that there was a split in the Congress Party with reference to the Constituency in question. The editor doubts if the hopes of success entertained by the Congress Party at the election would be realised. The split in the Congress has led to the suspicion expressed by the editor. In his opinion, candidates, who had the best support from the district Congress are not given seats and candidates in whose favour voters in the Constituency have expressed their desire have not been chosen. He sets out several reasons as to why the voters have become enraged and the Congress workers have become disappointed. He also refers to the fact that one Madhavaraj who was set up as a Congress Party candidate in the Udipi Constituency has withdrawn his candidature and that it is a great misfortune. He also states that on account of the petty-mindedness of the Congress leaders, the atmosphere of the District of South Kanara has become vitiated. Much of what is referred to is a matter of individual opinion. The next letter is exhibit P. 3. It is dated 10th January 1967. The author of this letter is one K. K. Shetty who is the President of the District Congress

Committee and editor of "Rashtra Jyothi". This letter is couched in vituperative language and is directed against one T. A. Pai who appears to have been a candidate for nomination as a Congress candidate during the elections but was not given a seat. A reference is also made to a statement alleged to have been made by Madvaraj that he declined the ticket if T. A. Pai was not given one. I may mention that the statement of Madvaraj is not placed before the Court and it is not known what exactly that statement contains. This exhibit mentions that after the statement made by Madvaraj a number of Congress members who are the followers of T. A. Pai have resigned and that they are also indulging in accusing the Congress Party, of communal bias and dictatorial attitude, power-mindedness, etc. But at the same time, the author of this article says that a sharp reaction has been produced and that the people are supporting the Congress candidate with greater enthusiasm. Eschewing those portions of this exhibit which are merely expressions of opinion or hearsay statements, the fact that such a statement was published cannot be disputed. My attention is next invited to exhibit P. 10 which is an editorial in the Kannada Weekly 'Prakash' dated 19th February 1967. This, it will be noticed, is after the elections. The editor, A. J. Alse apprehends that the Congress may meet defeat in the elections. He attributes this to the fact that the candidate desired by thousands of congressmen have not been chosen as Congress candidates. The editor refers to exhibit P. 3 and Casts aspersions against its author. This editorial supports T. A. Pai. All these documents taken together merely give an impression that there was a split in the Congress Party and that there was dissatisfaction with regard to the choice of the Congress nominees to stand for election on the Congress ticket.

It is pointed by the respondent's counsel that the above three documents do not refer to the second respondent or to his anti-Congress attitude. It is further contended that it is not specifically pleaded in the petition that the atmosphere in the Constituency was anti-Congress and that there

is no chance of the Congress succeeding, as the section that succeeded from the official Congress Party was influential and strong. There is, no doubt, much force in this argument. To indicate the attitude of the second respondent towards the Congress, the petitioners' counsel invites my attention to the oral evidence of P. W. 20. P.W. 20 is a member of the Communist Marxist Party which is alleged to have supported the 2nd respondent. This witness says that some of the Congress leaders came out of the Cangress Party and worked against the Congress candidates during the 1967 elections. He also gives the names of the prominent Congressmen who came out of the party. They are, according to him, the 2nd respondent, B. Kalppa Setty, A. J. Ulse, Seena Setty, Narasimha Holla and T. A. Vasudevan. None of these persons has been examined. T. A. Pai referred to in Ex. P. 3 was not in Station at the time of the elections. This witness does not mention why these Congressmen came out of the party. It is pointed out that in the petition, the reason for the second respondent's coming out of the party is that he was not satisfied with the choice of the respondent and others as Congress candidates by the Congress Parliamentary Board. This allegation has not been substantiated. The reason for the second respondent standing as an independent candidate has been mentioned by some of the petitioner's witnesses. P. W. 2 in his examination in chief says that the second respondent was not satisfied with the selection of the candiates by the Congress Party, and, therefore, he came out of the Congress Party and stood as an independent candidate for election. But in the later part of his evidence, he says that the second respondent was not dissatisfied as the Congress ticket had been given to the respondent. Therefore, in respect of the choice of the Congress nominee regarding the Udipi Constituncy, there was no reason for the 2nd respondent to be disposed against the respondent who stood on the Congress ticket. P. W. 3 states that the second respondent stood for election because he wanted to help his community. This witness is an Income-Tax Practitioner at Udipi and he was working for the P.S.P. candidate. P.W. 15 goes further and states that he would not have

voted for the 2nd respondent if he had stood on any party ticket; even if he had stood on Congress ticket, he says he would not have voted for him. The suggestion that the 2nd respondent and other Congressmen who followed T. A. Pai withdrew their support to the Congress for the reason that Madvaraj refused the Congress ticket is denied. The evidence of R.W. 3 indicates that the 2nd respondent did not apply for a seat from the Congress Party. It is Madhvaraj who had been proposed as a nominee of the Congress party. He declined to stand as a candidate for the reason that he was not well and it is he who suggested the name of the respondent to be nominated as the Congress candidate for election. It is admitted by both the parties, that Madhvaraj was an active Congressman who had rendered great services to the people and that he was very popular and influential in the Constituency. It is also said that he was held in great esteem by the people of the Constituency. It is in evidence that Madhvarj threw his weight and influence in favour of the Congress Party. He appears to have sustained a fall at Karwar and he was admitted on 21st January, 1967 to the Manipal Hospital as an in-patient and he was discharged by about 29th January 1967. From the evidence of R.W.3, it can be gathered that Madhvaraj worked for the Congress after his discharge from the hospital and as he was not able to walk much, he was going in car for canvassing. He was in charge of canvassing in the coastal area of the Udipi Constituency. If really, Madhvaraj was dissatisfied with the non-selection of T.A. Pai as a candidate and therefore refused to stand as a Congress nominee though he was chosen as a nominee by the Congress Party, it is not possible to appreciate as to how he could work for the Congress Party candidate or propose the name of the respondent who is one of his relations, as a Party nominee.

From what has been stated above, it can be inferred that there was a split in the Congress Party. This is not an unusual feature in any party. Several persons seek nomination from a political party but some of them are bound to get disappointed by not being chosen as candidates for election. This by itself

cannot lead one to the conclusion that the disappointed party-men work against the party or the existence of a dissentient group in a particular party weakners the party altogether. Confining my attention to this case, it is quite clear that from the figures of polling, the Congress party had not ceased to be influential inspite of some of the Congressmen going out of the Congress Party. It is also pointed out by the respondent's counsel that none of the petitioners' witnesses says that while canvassing for respondent No. 2, they harnessed any anti-Congress feeling. P. W. 2 says that the second respondent has been a Congress member since 1952. During 1952, 1957 and 1962 Elections as also in the elections of the Taluk Board and the Village Panchayat Board, the 2nd respondent has worked for the Congress. The second respondent is one of the leaders of the Congress Party. He also speaks to the names of several members of the Billava Community who have been supported by the Congress Party. He says that the 2nd respondent and Madhavaraj are on good terms. P. W. 13 merely states that he worked for the 2nd respondent in the 1967 elections. This witness is a Billava. He also does not speak of any voters being anti-Congress. P. W. 14 is Polling Agent of the 2nd Respondent. He says that the 2nd respondent was an active Congressman and he was a member of the Udipi Taluk Board. He was also a Chairman of the Katpady Panchayat. This witness bore affection for the 2nd respondent and it is for that reason that worked for him. He also speaks about one Dhonappa of Billava community being a member of the Legislative Council and a Congressman. Gangadharadas, an Advocate was put up as a candidate for election as a Congress candidate. One Suvarna of Billava community was a member of the Legislative Assembly as Congressman. So the evidence of the witness is that the Billava Community has every reason to be pro Congress. P. W. 15 also does not say that he was anti-congress. He worked for the 2nd respondent being a member of the Billava Community. It is only this witness who says that the voters of his community were not in favour of voting for the Congress. How far the statement of this kind that voters were inclined in favour of one party or another can

be accepted is extremely doubtful and it is partly a matter of opinion apart from it being a surmise. It is pointed that even P. W. 21 who was a Polling Agent of the 2nd respondent says that the Billava voters were not inclined to vote for the Congress candidates. As I have mentioned already, this statement is more a surmise and cannot be treated as evidence. In any event, while canvassing, he and his associates who worked for him told the voters that the 2nd respondent was an active Congressman. He had come out of Congress and he had rendered great services to the people and he was a member of their community and therefore the voters should vote for him. His evidence is also to the effect that about 200 voters whom he met said that they would vote for the Congress Party and that no voter told them that they would vote only to U. S. Naik. On the other hand the evidence of the witnesses for the respondent indicates that though they canvassed for the 2nd respondenting, they did so representing that the 2nd respondent was a person with Congress inclinations thus lending support to the respondent's arguments that the persons who worked for the 2nd respondent were not anti-Congress. R. W. 6, who is a counting agent and a close relation of the respondent states that during their work they were telling the voters that the 2nd respondent was also a Congressman and therefore they should vote for him. By such representation, most of the voters changed their mind and promised to vote for the 2nd respondent. This witness further states that if the respondent had not stood for election, he would have worked for the Congress Party and he worked for the respondent because he was related to him. R. W. 8, who is also a Polling Agent of the 2nd respondent, states that when he contacted the voters, they were inclined to vote in favour of the Congress Party. He represented to the voters that the 2nd respondent was an able person and he worked for the 2nd respondent for the reason that he was the maternal uncle of the witness. This witness says that he would have worked for the Congress Party if respondent No. 2 had not stood for election. The evidence of R. W. 10 who is also the Polling Agent and a relation of the 2nd respondent is that if he had

not stood for the election, the witness would have worked for the Congress candidate. R. W. 1 who was a polling agent of the 2nd respondent states that the 2nd respondent was saying that though he had come out of the Congress Party, he had every hope of succeeding in the election and even if he did so, his leanings would be towards Congress Party. This witness worked for the Congress Party for some time and then changed over to work for the 2nd respondent as he was prevailed upon by his relations to do so. This witness is a Billava. What is made out from the evidence of this witness is that there was no anti-Congress feeling amongst the members of the Billava community. The evidence of R. W. 2 who was also a Polling Agent of the 2nd respondent and who worked for him states that he told the voters that the 2nd respondent who had left the Congress Party for the time being and stood as an independent would come back to the Congress and that the 2nd respondent was a member of his community and therefore he should be supported. The evidence of these persons indicate the absence of any anti-Congress atmospher amongst the voters and in particular voters of Billava community.

It is next argued by Mr. Karanth that right Communist supported the P. S. P. candidate while the Left Communists supported the 2nd respondent. In support of this submission, the petitioners' counsel relies on the evidence of P. W. 10 and P. W. 20. Sri K. Shivashankara Bhat appearing for the respondent raises an objection that there is no plea in the Election Petition specifically stating that the Left Communists supported the 2nd respondent and that the Rightists of the Communist Party supported the P. S. P. candidate. It cannot be disputed that this is a material fact which ought to have been alleged in the petition. The petitioners' counsel while conceding that it is so, stated that the respondent is not taken by surprise by this evidence. This circumstance cannot be an excuse for not setting out definitely that the 2nd respondent had the support of the Left Communists. It would have been impossible for the respondent to adduce evidence to prove that the

petitioners' stand in that respect is baseless and false. This aspect assumes importance for the reason that this support to Respondent No. 2 is not of individual votes but of a party. Keeping this aspect of the petitioners' case, the evidence adduced by the petitioners in support of their stand may be examined. P.W. 10 is a Councillor of the Udipi Municipal Council. He is a member of the Beedi workers' Union and also the President of an Association, called Raita Sangha. These two associations are led by Communists. Amongst the members of the Beedi Workers Union, 500 are leftists and 300 are rightists. Among the members of the Raita Sangha, 200 are rightists and 400 are leftists. He states that during the 1967 elections, many voters of the Beedi Workers' Union and Raita Sangha had decided to vote for the 2nd respondent and that the rightists amongst them were in favour of the P.S.P. candidate. He states that a decision had been arrived at a month prior to the election and a decision had been taken after ascertaining the view from several parts of the Constituency. This appears to be highly improbable. He also states that he discussed the question as to whom the members of the Beedi Workers' Union and Raita Sangha should vote and they were not inclined to vote for the Congress Party. He also states that if the 2nd respondent had not stood for election, they would have voted for the P.S.P. candidate. His opinion about the inclination of the members are their statement that they would have voted for the P.S.P. candidate are mere matters of surmise and do not command any value. Further, in his cross-examination, this witness says that he does not know what decisions had been taken by the Beedi Workers Union in connection with the 1967 elections. Before arriving at a decision, meetings were held in various places where the members of the Beedi Workers' Union were present; he further states that there is a proceedings book maintained by the Beedi Workers' Union and the minutes of the proceedings of the meetings held by the Beedi Workers' Union in the several areas are recorded in the proceedings book. The proceedings book is not produced though it is available in the office of the Beedi

Workers' Union. He states that the Secretary makes a record in the proceedings book. The Secretary is P.W. 20 He is certain that there is an entry in the proceedings book regarding the decision taken in the General Body as to the party or the candidate that should be supported in the elections of 1967. He admits that Raita Sangh at Udipi is a branch of the District Raita Sangha of Mangalore. Even in regard to the decision of the Raita Sangha, he says that P.W. 20 is the Secretary of the Raita Sangha and the proceedings of the local as well as General Body meetings of the Raita Sangha were recorded in the minutes book. He states that the General Body meeting of the Raita Sangha was convened after ascertaining the view of the individual members and also holding meetings. The President and the Secretary have made entries in the said proceedings book. He says that more than 20 local meetings of the members of the Raita Sangha were held a month prior to the polling date. It is unnecessary for me to consider the evidence of this witness relating to the use of the communist flag, as it is not material. The evidence of these witnesses, so far as it relates to the decision of the Left Communist Party to support the second respondent or the Right Communist Party to support the P.S.P. candidate does not inspire confidence. It would not have been difficult to place reliable material in the shape of resolutions by the Left Communist Party to prove that they had decided to support the 2nd respondent and the Right Communist Party to support the P.S.P. candidate. The evidence of P.W. 20 is almost of the same nature. He is the Secretary of both the Associations and he and his Co-workers numbering 150 have worked for the 2nd respondent. His statement that if the 2nd respondent had not stood as a candidate, the support of the Left Communist Party would have been for the P.S.P. is merely an opinion and an inference and cannot be accepted. Similar is his evidence regarding the attitude of the Billava voters that they were not prepared to vote for the Congress Party and that 95 per cent of the Billava Voters would have voted in favour of the P.S.P. if respondent 2 had not stood as a candidate. When there was no decision taken by the Central Office as

to whom the party should give its support so far as the Udipi Constituency is concerned he says that a decision was taken by the local Communist Party. This decision was communicated to the Central Office. He further mentions that he had not received any direction from any quarter that he should assist the P.S.P. candidate. But in respect of Kaup Constituency, the Leftist Party at Udipi decided to support the P.S.P. candidate. It is extremely hard to accept such uncorroborated statements while documentary evidence should have been available if what they state is true. This witness further states that there were four contestants in the Udipi Parliamentary Constituency and they were from Congress Party, Swatantra Party, P.S. Party and Independent. He says that they supported Swatantra Party Candidate, while admitting that the policy of the Swatantra Party is contrary to the policy adopted by the Communist Party. This looks improbable. It is significant as already mentioned that no record of the proceedings of the Communist Party either the Rightists or the Leftists has been produced in this case. He states that when the 2nd respondent desided to stand against the Congress Party, a split was expected in the votes and he hoped that the 2nd respondent would get congress votes also. It shows that if the 2nd respondent had not stood, whatever support he got from the Congress Party would have gone to the benefit of respondent No. 1. This witness further states that other persons belonging to other communities have also worked for the 2nd respondent.

In view of the foregoing discussion and quite apart from the uncertainty involved as to the number of votes which the P. S. P. candidate would secure if the petitioner's plea is true, it is not possible to conclude that the 2nd respondent had the support of the Left Communist group and if he had not stood for election their votes on block would have gone in favour of the P. S. P. candidate.

Next a reference may be made to the argument that the respondent had the support of Billava voters and that if he had not stood for election, the entire Billava Community voters would have voted in favour of the P. S. P. candidate.

In this connection, several witnesses have been examined by the petitioners to speak to the fact that the voters belonging to the Billava Community stated that they would vote for the 2nd respondent and if he had not stood for election, they would have voted in favour of the P. S. P. candidate.

The plea of the petitioners is that the strength of voters of the Billava community is about 8,000 to 9,000. If the petitioners' case is believed, then the entire 8,000 or 9,000 votes would have gone in favour of the Praja Socialist Party candidate. The petitioners have examined several witnesses with a view to discharge the burden of proof which is heavily on them. The petitioners have examined witnesses who have worked for the candidate of the P. S. P. as also some who have worked for the second respondent. P. W. 2 says that he went canvassing amongst the members of the Billava Community whom he met and they were all saying that they were only for the 2nd respondent and that in his view if the 2nd respondent had not stood as a candidate for election, the voters of the Billava community would have exercised their votes in favour of U. S. Naik. In the first place, the evidence of this witness is interested in as much as he is a person who worked for a P. S. P. candidate. Secondly, even if it is proved that the voters whom he met said that they would only vote for the second respondent, it is impossible to act upon such a statement, because several forces come to play, before the voter actually exercises his franchise. It is not unusual that voters almost invariably express themselves in favour of any party or individual that approaches them for support in order to avoid unpleasantness. Therefore, it is most unsafe to rely upon the statement of any voter that he would vote in favour of a particular candidate. The position would be worse if the evidence is that the voters are alleged to have stated. Further, the evidence of this witness regarding his view which I have referred to above is a matter of inference and cannot be treated as evidence. P. W. 3 like P. W. 2 worked for the P. S. P. candidate. His evidence is to the same effect as that of P. W. 2. P. W. 7 is a person who worked

in the area of Alevoor for the P. S. P. His evidence is also to the same effect as that of P. W. 3. He also states that the Billava voters stated that they would vote only for the 2nd respondent and that if the second respondent had not stood for election, they would have voted for the P. S. P. P. W. 8 says that in Puttur area he worked for the P. S. P. in the 1967 elections. His evidence is to the same effect as that of P. W. 2 and P. W. 3. P. W. 17 is also a person who worked for the P. S. P. candidate and he states that Billava voters told him that they would vote for the 2nd respondent who is a member of their community. He does not even say the Billava voters said that they would vote in favour of the P.S.P. candidate. P.W.9 worked for the P.S.P. candidate in some areas of Shivalli village. P. W. 11 also worked for the P. S P. candidate and the evidence of these two is the same as those referred to earlier. P. W. 11 in his cross-examination, however, states that except Billava voters, all the voters whom he met promised to vote for the P. S. P. candidate. It is very difficult to believe the evidence of this witness as it is opposed to the actual result of the polling. Similarly, P. W. 12, P. W. 16, P. W. 18 and P. W. 19, worked for the P. S. P. candidate in Udipi Town. Their evidence is similar to the evidence of other witnesses who worked for the P. S. P. candidate and to whom a reference has already been made.

P.W. 4 is a Christian who worked for the 2nd respondent. His evidence is that Billava community voters said that they would vote in favour of 2nd respondent, who was a member of their community and if he had not stood as a candidate for election, the voters of the Billava community would have voted for the P.S.P. candidate as they were against the election of the Congress candidate. P.W. 5 was a Polling Agent of the 2nd respondent and he canvassed in the area of the Manipal Campus. His evidence is the same as that of P.W. 4. P.W. 6 is also a person who worked for the 2nd respondent in Udayavara village. Similarly, P. W. 13, P. W. 14 and P. W. 15 worked for the 2nd respondent. All these persons belong to the Billava community. P. W. 21 is a

person who is a polling Agent of the 2nd respondent. His evidence is to the same effect. He says that he met 1,500 voters in the Badagabettu village and Herga villages and out of them 400 were Billava voters. This witness says that they were all disposed to vote for the P.S.P. candidate with a view to defeat the Congress candidate but after he spoke to the voters, they became inclined to vote in favour of the 2nd respondent. This evidence is conjectural and stands on the same footing as the statements of several other witnesses, adverted to earlier and it is impossible to relay on it.

As against this evidence, the first respondent has chosen to examine several witnesses who were the Polling Agents of the 2nd respondent. R.W. 1 in his evidence states that he canvassed for the 2nd respondent in Kodavur and Malpe areas and he met more than 3000 voters. He says that he is even now a Congressman. He says that if the 2nd respondent had not stood for election as a candidate, the voters would have exercised their votes in favour of the Congress party candidate. He further says that if the 2nd respondent had not stood for elections as a candidate, he, his relations and his a tenants would have also acted in the same way. He adds that if the 2nd respondent had not stood as a candidate, he would have worked for the Congress candidate. R.W. 2 is Billava like R.W. 1. He was also a Polling Agent of the 2nd respondent. His evidence is to the same effect as that of R.W. 1. He states that some of the voters told him that if the 2nd respondent had not stood for elections, they would have voted for the Congress party only. Further he states that the public opinion regarding the P.S.P. candidate was not favourable. R.W. 6 worked in the Puttur area as a Polling Agent of respondent 2. R.W. 8 worked as a Polling Agent at Ambalpady area. Their evidence is the same as that of R.W. 2. R.W. 9. was a polling Agent of 2nd respondent. He says that he met about 600 to 700 voters in Kannarpady of Udipi Town. He also says that if the 2nd respondent had not stood for election, he would have worked for the Congress. R.W. 10 is also a Polling Agent of

the 2nd respondent, who worked in Herga Village. His evidence is to the same effect as that of R.W. 9. R.W. 11 is a Municipal Councillor of Udipi Town. He is a member of the Congress Party and he has worked for the Congress candidate. His evidence shows that a majority of the members of the Udipi Municipal Council belong to the Congress Party and like him several Municipal Councillors worked for the Congress Party in the Udipi Town. The comments I have made in regard to the petitioner's witnesses apply to the evidence adduced by the respondent also. It is difficult to rely upon such evidence.

I do not find it necessary to go into the details of the number of voters of the Billava community whom the witnesses contacted for the number of voters that belonged to the left or Right Communist Party. The evidence in that regard is totally vauge and unreliable, and even otherwise leads to no definite result.

Several other factors have been pressed by the respondent's counsel. He submits that there is affinity between Billava and fishermen, suggesting thereby that if the 2nd respondent has not stood for election, the votes cast in his favour would have been in favour of the respondent. The 2nd respondent belongs to Billava community and while the first respondent belongs to the fishermen community. Though the Election Law deprecates the casting of votes on communal considerations it is submitted that communal considerations do come into play and in this case it has acted. Regarding the communal affinity, the respondent's counsel had drawn my attention to the evidence of P.W. 2 who says that in all public and social activites, the two communities act in concert. P.W. 13 states that the Billavas and fisherman are governed by Aliyasanthana Law. P.W. 15, who is himself a Billava, states that he is a tenant of Krishnappa, who belongs to the fishermen community. This witness says that Krishnappa was a well-known man in the party and he is held in esteem and affection by all the members of his community. This Krishnappa died after the elections. The evidence of this witness bearing on the

affinity between Billavas and fishermen is corroborated by the evidence of R.W. 1, R.W. 2 and R.W. 4. R.W. 1 states that the Billavas are engaged in catching fish and cultivation of lands. Some of them manufacture Palmyra jaggery. Fishermen are also engaged in the same occupation as Billavas excepting manufacture and trading in jaggery. R.W. 2 who is also a Billava as R.W. 1 states that he trades in fish and he purchases them from fishermen indicating thereby that the members of the community are interdependent. R. W. 4 who is acquainted with Padukere area which lies along the coast line, says that there are only two communities in that area and they are Billavas and fishermen (Moguveera). The evidence refereed to above lends support to the submission that there is a great affinity between Billavas and fishermen. Another factor that has been brought to my notice by the respondent is that several non-Billavas have worked for respondent No. 2 indicating thereby that respondent No. 2 has polled votes from other communities also. It is pointed out that P.W 4 is a Protestant Christian who worked for the 2nd respondent. P. W. 5 is a Shivalli Brahmin who acted as Polling Agent of the 2nd respondent and who worked for him. There is evidence adduced by the respondent stating that all communities promised to support respondent No. 2. In fact, several of the 2nd respondent's polling agents who have been examined by the respondent are non-Billavas. Hence the theory advanced by the petitioners that votes polled by 2nd respondent were by and large that of the Billava voters cannot be accepted. Taking all these factors into consideration, quite apart from the fact that a large part of the evidence is inferential, it is impossible to predicate that the requisite number of votes polled in favour of the 2nd respondent would have been cast in favour of the P. S. P. candidate so as to secure to him the majority of votes. Another factor that should be borne in mind is that there are other three candidates in the field and it cannot be ruled out that they too would have shared the wasted votes. Therefore, it appears to me that the observations made by the Madras High Court in 8 E. L. R. 66 (Subramania

Goundar v. Election Tribunal) apply very aptly to the circumstances of this case. At page 77, Justice Subbarao, as he then was, observed as follows :—

> "It is easy to bring in a witness to depose how he would have voted if he had a chance to do so; but it is impossible in the nature of things to predicate that he would have done so in favour of the petitioner. It would have depended upon so many circumstances. The atmosphere prevailing at the election, the influence brought to bear on him, the strength of his party affiliations and many other considerations of momentary nature. Secondly, such evidence offends the principle of the election law embodied in the Act, namely, the secrecy of the ballot."

Therefore, the existence of so many uncertain factors referred to by me make it impossible to accept that the petitioners have established that if the second respondent's nomination had not been accepted, the result of election, in so far as the first respondent is concerned, would have materially affected. In spite of the large volume of evidence, the petitioners have adduced, it cannot escape the comment that it is conjectural and speculative and does not lead to any definite conclusion that the result of the election has been materially affected. Therefore, my finding on the second issue is against the petitioner.

The next contention relates to the third issue in the case. It is urged by the petitioners that the first respondent is the President of the South Kanara District Co-operative Fish Marketing Federation, Mangalore, and, therefore, he comes within the disqualification prescribed under section 10 of the Representation of the People Act. Section 10 reads as follows:

> "Disqualification for office under Government Company.—A person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary or a company or corpora-

tion (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share."

It is not disputed by the petitioners that the institution of which the respondent is the President is a Co-operative Society. They do not also contend that the respondent being the President of a Co-operative Society is exempt from the operation of Section 10 of the Act. But they contend that the exemption provided in the section in respect of co-operative societies is opposed to Article 14 of the Constitution. They submit that the provision exempting Co-operative Societies from the operation of Section 10 is discriminatory. It is pointed out that from exhibit P-12 it is clear that the share capital contributed by the Government is Rs. 2,04,000 while the share capital contributed by the Societies and the individuals together amounts to Rs. 51,100. It is also pointed out that the President of the Society has received remuneration of Rs. 4,852 as honorarium for the year 1965-66. If the exemption provided in respect of co-operative societies is *void* as being violative of Article 14 of the Constitution, then the disqualification provided under Section 10 will attach to the respondent. Sri Karanth tried to found his argument on the principle enunicated in A.I.R. 1955 Supreme Court P. 459 (Sathyanathan v. Subramanyan) that section 10 is intended to ensure that there is no occasion for a conflict between public duty and private interest. It is also pointed out that under the bye-laws, the President has powers of a managing agent, manager or secretary of any company. But the objection raised by the respondent's counsel in respect of this contention is two-fold. One is that the petitioners have no *locus standi* to question the *vires* of section 10 in as much as their interests are in no manner affected and they cannot be deemed to be aggrieved parties. In this connection, reliance is placed upon the decision reported in A.I.R. 1951, Supreme Court at page 41. (Charanjit Lal v. Union of India). It is laid down that no one except those whose rights are directly affected by a law can raise questions of the constitutionality of that law

The said decision also makes a distinction between the company and the shareholders and States that they are separate entities and if the allegation is made that any property belonging to the company has been taken possession of without compensation or the right enjoyed by the company under Article 19(1)(f) has been infringed, it would be for the company to come forward to assert or vindicate its own rights and not for any individual shareholder to do so. It appears to me that these observations cannot be of much avail to the respondent in view of the fact that under Section 81 of the Act, the voter is permitted to question the result of any election by filing an election petition. Therefore, it cannot be said that a voter can be treated as a person whose rights are not directly affected by the law which is impugned. He further contends that exemption of a Co-operative Society under Section 10 cannot be held to be discriminatory and violative of Article 14 of the Constitution. Reliance is placed on the decision of the Supreme Court in A.I.R. 1964 Supreme Court at page 980 (Mohamed Ali v. Union of India) wherein the provisions of the employees Provident Funds Act (1952) came up for consideration. The Supreme Court observes that the Act applies to all establishments except those mentioned Cl(1) of S. 16, as amended by Act 46 of 1960 which exempts establishments registered under the Co-operative Societies Act. The Co-operative Societies stand on a special footing which distinguishes them from other establishments or corporations. Under clause (1) of Section 16, establishments registered under the Co-operative Societies Act are exempted, because it is well-known that it is the settled policy of the Government to foster co-operative societies with a view to their development and growth in the interests of the community This view has also been taken by the Supreme Court in the cases reported in A.I.R. 1963 Supreme Court, pages 99 and 104 (Orient Weaving Mills v. Union of India). Therefore, the petitioners' contention that the classification is unreasonable cannot be sustained. There is a more formidable difficulty in the way of the petitioners. In A.I.R. 1954 Supreme Court, 686 (Jamuna Prasad v. Lachmi Ram), it is categorically laid down that the

petitioners as in this case cannot question the *vires* of any of the provisions of the Act in the proceedings under Section 81 of the Act. The pertinent observations of the Supreme Court in this regard are as follows :—

> "Both these provisions, namely sections 123(5) and 124(5), were challenged as '*ultra vires*', of Article 19(1)(a) of the Constitution. It was contended that Article 245(1) prohibits the making of laws which violate the Constitution and that the impugned sections interfere with a citizen's fundamental right to freedom of speech. There is nothing in this contention. These laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to enter parliament. The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute. *The fundamental Rights Chapter has no bearing on a right like created by the statute. The appellants have no fundamental right to be elected members of Parliament.*
>
> If they want they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are *intra Vires*".

(The underline is mine),

In view of the law laid down as above, it is not open to the petitioners to question the *vires* of Section 10 of the Act. The contention of the respondent that if the objection of the petitioners in regard to the *vires* of the exception provided in Section 10 is valid, then the entire section will be *ultra vires* Art 14 of the Constitution does not arise for consideration. Therefore, my findings on the third and the fourth issues are that Section 10 is *intra vires* the Constitution, and the first respondent comes within the exception provided in Section 10, and, therefore, he is not

disqualified from standing for election as a candidate, to the Mysore Legislative Assembly.

In view of my findings on issues Nos. 2, 3 and 4, the petition fails and is dismissed with costs of respondent No. 1, Advocate's fee Rs. 1,000.

(Sd.) K. R. Govivallabha Iyengar,
4-10-1967.

By order,

K. S. RAJAGOPALAN,
Secretary to the Election Commission,
India.